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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, *Petitioner*,

v.

ANTHONY CORNELL BEAN, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

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APPENDIX A

FILED
February 23, 1995
Clerk, California Supreme Court
/s/ Deputy

No. S040182

IN THE SUPREME COURT OF CALIFORNIA

IN BANK

IN RE ANTHONY CORNELL BEAN

ON

HABEAS CORPUS

Petitioner's application for leave to supplement the petition is granted. The request to withdraw declarations is denied.

The petition for writ of habeas corpus is denied on the ground that it is untimely, does not identify those claims regarding which petitioner lacked knowledge or advise when he became aware of the factual basis for those claims, and does not adequately explain the delay in investigating and presenting the claims. (In re Clark (1993) 5 Cal.4th 750, 774-775.)

Claims II, III, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIV, XXV, XXVI, XXVII, XXVIII, XXIX, XXX, XXXIV, XXXVII, XXXVIII, XXXIX, XL, XLI, XLII, XLIII, XLIV, XLV, XLVII, and XLVIII and also procedurally barred in what they were or could have been, but were not, raised on appeal or were waived by failure to

preserve them at trial. (In re Harris (1993) 5 Cal.4th 813, 826; In re Clark (1993) 5 Cal.4th 750, 765; In re Waltreus (1965) 62 Cal.2d 218, 225. See also, People v. Bean (1988) 46 Cal.3d 919.)

Claims IV, XXXII, XXXV, XXXVI, XLVI, XLIX, L, LI, LII, and LIII have been considered on their merits (see In re Clark, supra, 5 Cal.4th 750, 797-798), but, in light of the record of the trial and related proceedings, fail to state a prima facie case entitling petitioner to relief.

Mosk, J. is of the opinion an order to show cause should issue.

_____

Chief Justice

APPENDIX B

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARTHUR CALDERON, WARDEN, Petitioner, v. **THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,** Respondent, **ANTHONY CORNELL BEAN,** Real Party in Interest.	No. 96-70585 D.C. No. Civ. S-89-1643-DFL-PAN OPINION

Petition for Writ of Mandamus to the United States District Court for the Eastern District of California William B. Shubb, District Judge, Presiding

Submitted September 23, 1996*

Filed September 30, 1996

Before: William C. Canby, Jr., Diarmuid F. O'Scannlain and Sidney R. Thomas, Circuit Judges.

Opinion by Judge O'Scannlain

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* The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed.R.App.P.34(a),Ninth Circuit R. 34-4

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals denied a petition for a writ of mandamus. The court held that a procedural default in state court based on an ambiguous order that does not bar federal habeas review.

Death row inmate Anthony Bean filed a state petition for a writ of habeas corpus. The California Supreme Court denied the petition holding that the entire petition was untimely and that 39 of the claims were procedurally barred in that they were not raised on appeal or were waived by failure to preserve them at trial.

Bean filed a federal habeas petition. The State moved to dismiss, contending that the procedural default doctrine barred federal review because the grounds on which the California Supreme Court denied Bean's state habeas petition were inadequate and independent.

A magistrate judge (MJ) concluded that there were not adequate and independent grounds to preclude federal review. The district court adopted the MJ's findings and denied the State's motion. The State filed a petition for writ of mandamus directing the district court to vacate its order.

[1] The procedural default doctrine is a specific application of the general adequate and independent state grounds doctrine. The adequate and independent state grounds doctrine provides that the Supreme Court will not review a question of federal law decided

by a state court if the decision of the court rests on a state law ground that is independent of the federal question and adequate to support the judgment. The procedural default doctrine bars federal habeas review when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement.

[2] For the procedural default doctrine to apply, a state rule must be clear, consistently applied, and well established at the time of the petitioner's purported default.

[3] The California Supreme Court cited a 1993 case as a basis for denying Bean's claims as untimely. That case attempted to explain and apply the timeliness requirements the California Supreme Court had adopted in 1989 for filing habeas petitions in capital cases. [4] There was no dispute that Bean's default, if any, would have occurred before that 1993 case. [5] In 1996, the California Supreme Court ruled that prior to the 1993 decision California's timeliness requirements were not clear, consistently applied, and well established.

[6] Under the 1996 decision, California's timeliness rules did not provide an adequate state ground barring federal review on the merits.

[7] The California Supreme Court cited three cases as a basis for denying the 39 claims: the 1993 case, a 1965 case, and a second 1993 case.

[8] The 1965 case ruled that any issue that was actually raised and rejected on appeal cannot be renewed in a petition for writ of habeas corpus. A

citation to this case did not bar federal review. The case stood for the ordinary state rule barring relitigation of claims raised on direct appeal, not a ruling on the merits or a procedural default.

[9] The second 1993 case discussed an earlier decision that prohibited raising an issue in a postappeal habeas corpus petition when that issue was not, but could have been, raised on appeal.

[10] The California Supreme Court's order provided no basis upon which to apply this rule, if adequate, to Bean's claims. The order, which was ambiguous, did not specify which of Bean's 39 claims the court rejected under the 1965 decision and which it rejected under the second 1993 decision. A procedural default based on an ambiguous order that does not clearly rest on adequate and independent state ground is not sufficient to preclude federal collateral review. The district court properly declined to dismiss those claims.

COUNSEL

Clayton S. Tanaka, Deputy Attorney General, Sacramento, California, for the petitioner.

Andrea M. Miller, Nageley, Meredith & Ramsey, Sacramento, California, for the real party in interest.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether a California death row inmate's procedural default in state court bars federal review of his habeas claims.

I

Arthur Calderon, Warden of the California State Prison at San Quentin (the "State"), petitions this court for a writ of mandamus directing the district court to vacate its order denying the State's motion of summary dismissal of Anthony Bean's habeas petitioner.

In June 1981, a jury convicted Bean of the murders of Beth Schatz and Eileen Fox. Bean was sentenced to life in prison without possibility of parole for the murder of Fox, and to death for the murder of Schatz. The California Supreme Court affirmed Bean's convictions and sentences on September 19, 1988, *People v. Bean,* 760 P.2d 996 (Cal. 1988), and the United States Supreme court denied certiorari on March 19, 1990, *Bean v. California,* 494 U.S. 1038 (1990).

In June 1990, Bean filed an application in federal court for a stay of execution and appointment of counsel. The district court appointed counsel on July 26, 1990, and Bean filed a federal habeas petition on July 18, 1991. On September 26, 1991, the district court granted a stay of execution, allowing Bean to exhaust his state remedies.

Bean filed his state petition for a writ of habeas corpus on May 27, 1994. The California Supreme Court denied the petition on February 23, 1995, for the following reasons:

> The petition for writ of habeas corpus is denied on the ground that it is untimely, does not identify those claims regarding which petitioner lacked knowledge or advise when he became aware of the factual basis for those claims, and does not adequately explain the delay in investigating and presenting the claims. (In re Clark (1993) 5 Cal.4th 750, 774-775.)
>
> [Thirty-nine claims] are also procedurally barred in that they were or could have been, but were not, raised on appeal or were waived by failure to preserve them at trial. (In re Harris (1993) 5 Cal.4th 813, 826; In re Clark (1993) 5 Cal.4th 750, 765; In re Waltreus (1965) 62 Cal.2d 218, 225. See also, People v. Bean (1988) 4 Cal.3d 919.)
>
> [Ten claims] have been considered on their merits (see In re Clark, supra, 5 Cal.4th 750, 797-798), but, in light of the record of the trial and related proceedings, fail to state a prima facie case entitling petitioner to relief.

In re Bean, No. S040182 (Cal.Feb.23, 1995) (order denying petition for writ of habeas corpus).

Bean notified the district court of exhaustion of state remedies and filed an amended federal petition for a writ habeas corpus on March 22, 1995. The State filed a motion to dismiss the petition on July 21, 1995. The State argued that the grounds on which the California Supreme Court denied Bean's state habeas

petition were adequate and independent to preclude federal review.

On November 17, 1995, the magistrate judge recommended that the district court deny the motion. The magistrate judge concluded that there were not adequate and independent grounds to preclude federal review because, *inter alia,* (1) California's timeliness rule was not sufficiently clear at the time of Bean's purported default' (2) California's rule precluding consideration of claims which were raised on appeal is not a procedural bar; and (3) California's rule precluding consideration of claims which could have been, but were not, raised on appeal, was not consistently applied at the time of Bean's direct appeal. The district court adopted the magistrate judge's findings and recommendations on March 29, 1996, and denied the State's motion to dismiss.

The State petitions this court for a writ of mandamus directing the district court to vacate its order.[1]

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1 . On May 8, 1996, the State filed in district court a motion to withdraw from its previous stipulation to an evidentiary hearing on certain issues, arguing that the Antiterrorism and Effective Death Penalty Act of 1996 affects the propriety of an evidentiary hearing on Bean's claims. By order filed May 15, 1996, the magistrate judge denied the motion. No issues regarding the Act's application to Bean's claims are before us on the State's petition.

In determining whether to issue a writ of mandamus, we balance the following five factors ("the *Bauman* factors"):

> (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he desires;
>
> (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal;
>
> (3) whether the district court's order is clearly erroneous as a matter of law;
>
> (4) whether the district court's order is an oft repeated error or manifests persistent disregard for the federal rules; and
>
> (5) whether the district court's order raises new and important problems or issues of law of first impression.

In re Cement Antitrust Litig., 688 F.2d 1297, 1301 (9th Cir. 1982) (citing *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, 654-55 (9th Cir. 1977)), *aff'd sub nom. Arizona v. U.S. Dist. Court.*, 459 U.S. 1191 (1983); *see* 28 U.S.C. § 1651.

Although all five factors need not be satisfied, "it is clear that the third factor, the existence of clear error as a matter of law, is dispositive." *Executive Software North Am. v. U.S. Dist. Ct.*, 24 F.3d 1545, 1551 (9th Cir. 1994) (citations omitted). "When the district court's order is correct as a matter of law, it is obvious

that the writ of mandamus should not be issued." *Survival Sys. v. United States Dist. Court,* 825 F.2d 1416, 1418 (9th Cir. 1987), *cert. denied,* 484 U.S. 1042 (1988). Accordingly, we first examine whether the district court clearly erred.

[1] The State moved to dismiss Bean's habeas petition on the grounds that the procedural default doctrine bars federal review of his claims. "[T]he procedural default doctrine is a specific application of the general adequate and independent state grounds doctrine." *Wells v. Maass,* 28 F.3d 1005, 1008 (9th Cir. 1994). Under the adequate and independent state grounds doctrine, the United States Supreme Court "will not review a question of federal law decided by a state court of the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson,* 501 U.S. 722, 729 (1991). The procedural default doctrine "bar[s] federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." (*Id.* at 729-30.)

[2] Not all state procedural bars are "adequate" to foreclose federal review. For the procedural default doctrine to apply, "a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default." *Wells,* 28 F.3d at 1010 (Citing *Ford v. Georgia,* 498 U.S. 411, 424 (1991) ("an adequate and independent state procedural bar to the entertainment of constitutional claims must have been 'firmly established and regularly followed' by the time as of which it is to be applied")) (other citations omitted). The reasons for these requirements, we have explained, is that "it is grossly unfair -- and serves none

of the purposes of respect for procedural -- to forfeit an individual's constitutional because he failed to follow a rule that 'was not firmly established at the time in question.'" *English v. United States,* 42 F.3d 473, 478 (9th Cir 1994) (quoting *Ford,* 498 U.S. at 425).[2]

We therefore must decide whether the procedural rules the California Supreme Court cited in denying Bean's state habeas petition were adequate to foreclose federal review of his claims.

A

[3] The California Supreme Court denied Bean's entire state habeas petition as untimely, citing *In re Clark,* 855 P.2d 729 (Cal. 1993). In *Clark*, the California Supreme Court acknowledged that "no clear guidelines [regarding departure from the habeas corpus rules] have emerged in our past cases." *Clark*, 855 P.2d at 737. *Clark* attempted to explain and apply, among other things, the timeliness requirements the California Supreme Court had adopted in June 1989 for the filing of habeas petitions in capital cases. *See* Supreme Court Policies Regarding Cases Arising from

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2 . Stated differently, "the federal courts should not insist upon a petitioner, as a procedural prerequisite to obtaining federal relief, complying with a rule the state itself does not consistently enforce." *Siripongs v. Calderon,* 35 F.3d 1308, 1318 (9th Cir. 1994) (citing *Johnson v. Mississippi,* 486 U.S. 578, 587 (1988) ("a state procedural ground is not adequate unless the procedural rule is strictly or regularly followed")) (other citation omitted), *cert. denied,* 115 S.Ct. 1175 (1995).

Judgments of Death, In California Rules of Court--State 745-46 (199) (the "Standards"). Under the Standards, a habeas petition filed within 60 days (later extended to 90 days) after the final due date of the petitioner's reply brief on direct appeal is presumed timely. Petitions filed more than 60 or 90 days after the final due date must establish the absence of substantial delay or good cause for the delay.[3]

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3 . The pertinent Standards provide:

> 1. Timeliness standards
>
> 1-1. Appellate counsel in capital cases shall have a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus. All petitions for writs of habeas corpus should be filed without substantial delay.
>
> 1-1.1. A petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 60 [later 90] days after the final due date for the filing of appellant's reply brief on the direct appeal.
>
> 1-1.2. A petition filed more than 60 [later 90] days after the final due date for the filing of appellant's reply brief on the direct appeal may establish absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel became aware of information

[4] The issue before us is whether California's timeliness requirements were firmly established and regularly followed at the time of Bean's purported procedural default. There is no dispute that Bean's default, if any, would have occurred before *Clark* was

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indicating a factual basis for the claim and became aware, or should have become aware, of the legal basis for the claim.

1-1.3 Alternatively, a petition may establish absence of substantial delay if it alleges with specificity facts showing that although petitioner or counsel was aware of the factual and legal bases for the claim before January 16, 1986 (the date of finality of *In re Stankewitz* (1985) 40 Cal.3d 391, 396-397, fn.1, 220 Cal.Rptr. 382, 708 P.2d 1260), the petition was filed within a reasonable time after that date.

1-2. If a petition is filed after substantial delay, the petitioner must demonstrate good cause for the delay. A petitioner may establish good cause by showing particular circumstances sufficient to justify substantial delay.

1-3. Any petition that fails to comply with these requirements may be denied as untimely.

Standards at 745-46.

decided. The State conceded as much before the district court,[4] and does not argue otherwise here.

[5] The State does argue at length that California courts regularly and consistently applied the timeliness procedural bar even before *Clark*.[5] We recently concluded otherwise, however, in *Morales v. Calderon*, 85 F.3d 1387 (9th Cir. 1996). In *Morales*, we found "so much variation in application of California's timeliness requirements before *Clark* that . . . no discernible clear rule then existed for petitions filed more than 90 days after the due date of the reply brief on direct appeal." *Id.* at 1391. Since California's timeliness requirements were not "clear, consistently applied, and well established" before *Clark*, they could "not serve as an adequate and independent state ground sufficient to support a procedural default." *Id* at 1393.

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4 . At oral argument, the magistrate judge asked petitioner's counsel the following question: "This case, of course everything was pre-*Clark*, is that not correct?" Petitioner's counsel responded that "what we are talking about is the enforcement of an old rule, we're not talking about retroactive application of a brand-new rule which would probably be inappropriate."

5 . The State also argued in its petition that even if California's timeliness requirements were not adequate pre-*Clark*, at least the rule that Ben offered some justification for his delay was adequate. In a subsequently filed erratum, the State noted that, contrary to what its petition represents, Bean did in fact attempt to justify his delay. We therefore do not reach the merits of this argument.

We express no opinion as to whether *Clark* sufficiently clarified California's timeliness requirements to render them an adequate procedural bar to federal review. *See Id.* at 1391 ("[w]e need express no opinion on whether the attempted succeeded, so that timeliness under the Standards invoked post-*Clark* would constitute an adequate and independent state ground of decision").

[6] Under *Morales,* California's timeliness rule, at least as applied to a pre-*Clark* procedural default, does not provide an adequate state ground barring federal review on the merits.[6]

B

[7] The California Supreme Court also denied thirty-nine claims on the grounds that they were, or unjustifiably were not, raised on appeal, or were waived by failure to preserve them at trial. The court cited *Clark*; *In re Harris,* 855 P.2d 391 (Cal. 1993); and *In re Waltreus,* 397 P.2d 1001 (Cal.), *cert. denied,* 382

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6. The State also argued that California's successive petition bar was adequate to preclude federal review in this case. In *Siripongs,* we held that California's pre-*Clark* successive petition standards were not adequate because they were not consistently enforced. We need not examine *Clark's* new standards regarding successive habeas petitions since Calderon acknowledged in his subsequently filed erratum that Bean has filed only one petition. We also express no opinion regarding the application of California's timeliness rules to post-*Clark* successive petitions.

U.S. 853 (1965), but did not indicate which bar applied to which claims.

[8] California's *Waltreus* rule provides that "any issue that was *actually* raised and rejected on appeal cannot be renewed in a petition for a writ of habeas corpus." *Harris,* 855 P.2d at 398. A *Waltreus* citation does not bar federal review. In *Ylst v. Nunnemaker,* 501 U.S. 797 (1991), the Supreme court explained that *Waltreus* stands for the "ordinary state rule barring relitigation of claims raised on direct appeal," not a ruling on the merits nor a procedural default. *Id.* at 806. As such, 'a *Waltreus* denial on state habeas has no bearing on [the petitioner's] ability to raise a claim in federal court." *Forrest v. Vasquez,* 75 F.3d 562, 564 (9th Cir. 1996) (citing *Nunnemaker,* 501 U.S. at 805).

[9] The State argues, nonetheless, that the procedural bar of *In re Dixon,* 264 P.2d 513 (Cal.1953), discussed in *Harris,* is adequate to preclude federal review. The *Dixon* rule "generally prohibits raising an issue in a postappeal habeas corpus petition when that issue was not, but could have been, raised on appeal." *Harris,* 855 P.2d at 395 n.3.

Whether the *Dixon* rule was sufficiently clear and consistently applied at the time Bean filed his direct appeal is open to some question. *See Deere v. Calderon,* 890 F. Supp. 893, 901 (C.D. 1995) (federal habeas claims foreclosed based on *Dixon* rule); *Odle v. Calderon,* 884 F. Supp. 1404, 1413 (N.D. Cal. 1995) ("the *Dixon* procedural rule has not been uniformly and regularly applied by the California Supreme Court"); *Karis v. Vasquez,* 828 F. Supp. 1449, 1467-68 (E.D. Cal. 1993) (*Dixon* rule merely discretionary policy and thus not adequate).

[10] We need not resolve the issue here, however, since the California Supreme Court's order provides no basis upon which to apply the *Dixon* rule, if adequate, to Bean's claims. The order, which we agree with the district court is ambiguous, does not specify which of Bean's thirty nine-claims the court rejected under *Waltreus,* and which it rejected under *Harris/Dixon.* "[A] procedural default based on an ambiguous order that does not clearly rest on independent and adequate state grounds is not sufficient to preclude federal collateral review." *Morales,* 85 F.3d at 1392 (citing *Siripongs v. Calderon,* 35 F.3d 1308, 1317-18 (9th Cir. 1994), *cert. denied,* 115 S. Ct. 1175 (1995)). The district court properly declined to dismiss these claims.

Since the district court's order was correct as a matter of law, we need not address the other four *Bauman* factors.

IV

For the foregoing reasons, the State's petition for a writ of mandamus is denied. The district court shall consider Bean's habeas petition on its merits.

PETITION DENIED.

APPENDIX C

FILED
NOV 17, 1995
Clerk, U.S. District Court
Eastern District of California
/s/ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTHONY CORNELL BEAN, Petitioner, v. **ARTHUR CALDERON,** Respondent.	Civ. S-90-0648 EJG GGH DEATH PENALTY CASE FINDINGS AND RECOMMENDATIONS

Respondents' motion to dismiss, filed July 18, 1995, came on for hearing October 12, 1995, before the undersigned. Andrea M. Miller and Andrew S. Love appeared for petitioner. Clayton S. Tanaka and Harry Columbo appeared for respondent. Having reviewed the motion and the documents in support and opposition and heard the arguments of counsel, the court has determined that respondent's

motion to dismiss for procedural default should be denied.

BACKGROUND

In July, 1981 a jury convicted petitioner of the murders of Beth Schatz and Eileen Fox. Petitioner was sentenced to death for the murder of Beth Schatz and to life without possibility of parole for the murder of Eileen Fox.

On September 19, 1988, the California Supreme Court affirmed petitioner's convictions on appeal. People v. Bean, 46 Cal.3d 919, 251 Cal.Rptr. 467 (1988), cert. denied 494 U.S. 1038 (1990). After the California Supreme Court relieved petitioner's state-appointed counsel in April, 1990, petitioner, acting in propria personam, applied in May 1990 to this court for a stay of execution and for the appointment of counsel. On July 26, 1990, this court appointed counsel to represent petitioner. Counsel

filed in this court on July 18, 1991, a petition for writ of habeas corpus.

On September 26, 1991, this court issued its order staying the case, allowing petitioner to exhaust his state remedies. On May 26, 1994, counsel for petitioner filed a state petition for writ of habeas corpus. On February 22, 1995, the California Supreme Court denied the state petition without issuing an order to show cause and without holding an evidentiary hearing.

The state supreme court denied the state habeas petition on exhaustion on three grounds:

1. all claims were denied as untimely raised;

2. 39 claims were barred on account of the failure to raise them properly on direct appeal or at trial;

3. 10 claims were denied on their merits as failing to state a prima facie case entitling petitioner to

relief (whether based on state law or federal law was not revealed).

Petitioner notified the court of exhaustion of remedies, re-opened this proceeding, and filed an amended petition for writ of habeas corpus on March 22, 1995. Respondents filed a preliminary answer on June 8, 1995, and on July 21, 1995, filed the present motion to dismiss based on procedural default. Because it is an affirmative defense and because respondents move for dismissal, respondents bear the burden of establishing that California's procedural default rules are adequate to bar federal review. Karis v. Vasquez, 828 F.Supp. 1449, 1463 n. 21 (E.D. Cal. 1993). The court discusses in turn each ground of denial stated by the California Supreme Court.

PROCEDURAL DEFAULT

1. Legal Standards

Based on concerns of comity and federalism, federal courts will not review federal questions presented by a habeas petition if a prior state court decision denying relief to the petitioner rests on a state procedural rule that is independent of federal law and adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546 (1991); Harris v. Reed, 489 U.S. 255, 109 S.Ct. 1038 (1989). A federal court faced with an ambiguous state court decision presumes that there is no bar to the federal court's consideration of federal claims " . . . unless the last state court rendering a judgment on the case clearly and expressly states that its judgment rests on a state procedural bar." Harris, 489 U.S. at 263 (citations omitted). Federal questions should be reached only "when it fairly appears that a state court judgment rested primarily on federal law or was interwoven with federal law, that is, in those cases

where a federal court has good reason to question whether there is an independent and adequate state ground for that decision." Coleman at 735.

To be independent of federal law, a state procedural practice must not "depend upon an antecedent determination of federal law." Harmon v. Ryan, 959 F.2d 1457, 1461 (9th Cir. 1992). To be adequate, a state procedural practice must be "clearly defined," id. at 1462, "firmly established," James v. Kentucky, 466 U.S. 341, 348-51, 104 S.Ct. 1830, 1835-1836 (1984), and "regularly followed," Id. A rule is regularly followed if it is applied in "the vast majority of cases." Dugger v. Adams, 489 U.S. 401, 410 n. 6, 109 S.Ct. 1211, 1217 (1989). The Ninth Circuit has explained the adequate state ground requirement as follows:

> [T]he procedural default is not "adequate" if the state courts themselves bypass the petitioner's default and

> consider his claims on the merits, if the procedural rule appears to be discretionary, or, ordinarily, if the state fails to assert an interest in compliance with its procedural rules in the petitioner's federal habeas proceedings.

Harmon, 959 F.2d at 1461 (citations omitted).

If the state court decision is supported by an independent and adequate state ground, the federal court may still consider the claim if the petitioner demonstrates: (1) cause for the default and actual prejudice resulting from the alleged violation of federal law, or (2) a fundamental miscarriage of justice. Harris, 489 U.S. at 262, 109 S.Ct. 15 1043 (citing Murray v. Carrier, 477 U.S. 478, 485, 495, 106 S.Ct. 2639, 2644 (1986)). "'[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.'" McCleskey v. Zant, 499 U.S. 467, 493-94, 111 S.Ct. 1454, 1469-1470 (1991)

(quoting Murray, 477 U.S. at 488). Examples of cause include showings "that the factual or legal basis for a claim was not reasonably available to counsel," "that some interference by officials made compliance impracticable," or "of ineffective assistance of counsel." Murray, 477 U.S. at 488, 106 S.Ct. at 2645. The Court has limited the "fundamental miscarriage of justice" exception to those who can show actual innocence, id. at 490; Noltie v. Peterson, 9 F.3d 802, 806 (9th Cir. 1993), including actual innocence of the death penalty, Smith v. Murray, 477 U.S. 527, 537-38, 106 S.Ct. 2661 (1986); Sawyer v. Whitley, 505 U.S. 333, 112 S.Ct. 2514 (1992).

2. Analysis

a. Timeliness

In the instant case, the California Supreme Court, citing In re Clark, 5 Cal.4th 750, 774-775, (21 Cal.Rptr.2d 509) (1993), issued an opinion

which first denied petitioner's entire state habeas petition "on the ground that it is untimely, does not identify those claims regarding which petitioner lacked knowledge or advise when he became aware of the factual basis for those claims, and does not adequately explain the delay in investigating and presenting the claims."

Even respondent concedes that the California Supreme Court's overall timeliness ruling is overbroad. The ruling seemingly encompasses even those claims that had been timely raised on direct appeal, but which were "re-exhausted" in the state habeas petition filed after initial proceedings in this court. Of course, the fact that petitioner has exhausted claims "too much" has never been held to be a procedural bar to a claim that is otherwise devoid of procedural taint. However, because of the court's findings with respect to the remainder of the

"untimely" claims, it is not necessary to segregate the old claims from the new ones.

A brief review of the history of the California courts' timeliness bar is instructive in determining this basis for the court's ruling. The California courts have generally disfavored unduly delayed petitions. See, e.g., People v. Jackson, 10 Cal.3d 265, 110 Cal.Rptr. 142 (1973); In re Saunders, 2 Cal.3d 1033, 88 Cal.Rptr. 633 (1970). However, the early cases provided little guidance as to just what constituted undue delay or what would excuse a finding of undue delay. In re Stankewitz, 40 Cal.3d 391, 396-97 n. 1, 220 Cal.Rptr. 302 (1986), the court stated that a petitioner must "point to particular circumstances sufficient to justify substantial delay." However, the court did not define how much delay was "substantial."

In 1989, the California Supreme Court established standards, including timeliness standards,

for filing habeas corpus petitions in capital cases. Those standards require appellate counsel to investigate possible bases for a habeas petition. California Supreme Court, Standards for Preparation and Filing of Habeas Corpus Petitions Relating to Capital Cases and For Compensation of Counsel in Connection with Those Cases, 50 Cal.3d 1-4 (Dec. 1993). A petition filed within 60 (now 90) days of the filing of the appellate reply brief is presumed timely. Id.

Petitioners who did not file within this time period could establish an absence of substantial delay in two ways. First, they could provide specific facts showing the petition "was filed within a reasonable time after petitioner or counsel became aware of information indicating a factual bases for the claim and became aware, or should have become aware, of the legal basis for the claim." Standard 1-1.2

(emphasis in original). Second, petitioners could allege specific facts "showing that although petitioner or counsel was aware of the factual and legal bases for the claim before January 16, 1986 [the final date of Stankewitz] . . . the petition was filed within a reasonable time after that date." Standard 1-1.3. Petitioners failing to meet these standards could seek to demonstrate "good cause by showing particular circumstances sufficient to justify substantial delay." Standard 1-2.

In 1993, the California Supreme Court clarified its timeliness rules and set forth specific exceptions to the timeliness bar. In re Clark, 5 Cal.4th 750, 21 Cal.Rptr.2d 509 (1993). The court reviewed the state procedural limitations applicable to petitions for habeas corpus, including the rules applicable to delayed petitions, repeated petitions, and piecemeal presentation of claim. In describing prior state

practice limiting habeas corpus relief, the court stated: "because no clear guidelines have emerged in our past cases, we consider when departure from those rules is warranted." Id. at 763.

The Ninth Circuit, agreeing that no clear state procedural guidelines existed, has held that, at least prior to 1993, California courts inconsistently applied the state timeliness standards. Siripongs v. Calderon, 35 F.3d 1308, 1318 (9th Cir. 1994), cert denied, 115 S.Ct. 1175 (1995); see also, Karis v. Vasquez, 828 F.Supp. 1449, 1463 (E.D. Cal. 1993).

The California Supreme court cited Clark in the instant case as a bar to petitioner's state habeas petition. In doing so, the Court retroactively applied Clark because, by definition, the timeliness bar means petitioner should have raised the claims earlier. The problem is that, although petitioner filed the state habeas petition at issue in this case after Clark, at the

time petitioner should have raised the claims, i.e., within a reasonable time after the final date of Stankewitz, Clark was not the law.[1/] The question then is whether the federal court should respect the state court's retroactive application of its Clark timeliness rules to bar consideration of petitioner's claims.

Deere v. Calderon, 890 F.Supp. 893 (C.D. Cal. 1995) briefly addresses the application of Clark to a procedural default which took place prior to the Clark opinion. In Deere, petitioner filed a first petition prior to Clark and a second petition after Clark. The second petition had been denied as untimely by the California Supreme Court, citing Clark.

1/ Petitioner's conviction was affirmed on appeal on September 19, 1988, at a time when both the pre-Clark and pre-Standards procedural rules were in effect. Stankewitz was the applicable law concerning timeliness of state habeas petitions. Petitioner filed his state "exhaustion" habeas petition prior to the Clark decision as well.

The Deere court found that the California Supreme Court had consistently applied the Clark standards to the nine habeas petitions filed after Clark. The Deere court thus concluded that Clark's timeliness rule was adequate to bar federal review. In reaching that conclusion, the court only briefly addressed the retroactivity issue:

> It is not unfair or unjust to now honor the procedural bar in the face of the previous ruling of inconsistency in California. Clark did not change the requirements for filing state habeas petitions in California. Clark merely put petitioners on notice that previously established standards would be followed.

890 F.Supp. at 900.

In summarily determining that retroactivity was not a problem, the district court in Deere did not discuss two important points. First, it failed to consider that, as described above, the California Supreme Court itself acknowledged that its

timeliness rules were sporadically applied, and understood its opinion in Clark to mark a significant change in its use of the timeliness rules.[2/] Second, the Deere court failed to examine the retroactivity issue as applied to the law of procedural default. Most importantly in the last respect, Deere is contrary to Supreme Court and Ninth Circuit authority.

A litigant must have a fair opportunity to comply with known procedural rules. In order to provide this fair opportunity, the state procedural bar at issue is the one in place at the time the claim

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2/ Clark itself is inconsistent in its characterization of the past fidelity of the state courts to apply procedural bar to state habeas petitions on account of untimeliness. At one point, Clark intimates that Stankewitz simply affirmed the longstanding practice that required petitions to be timely filed, Clark, 5 Cal.4th at 783, 21 Cal.Rptr.2d at 530-531; at another, Clark implicitly concedes that the Stankewitz bar was not consistently applied. Id. at 786, 21 Cal.Rptr.2d at 533. In addition, insofar as the discovery of new claims is concerned, Clark expressly concedes that prior to 1989, counsel had no obligation to investigate the possibility of new claims. Id. at 783, 21 Cal.Rptr.2d at 531.

should have been raised. Ford v. Georgia, 498 U.S. 411, 424, 111 S.Ct. 850, 857 (1991). In Ford, the state supreme court had established a new procedural rule governing the timely assertion of a Batson claim. The state court then retroactively applied the new rule to bar the petitioner's Batson claim. The Supreme Court found that since the rule was not firmly established at the time the petitioner should have raised the claim, it was inadequate to bar federal review. 498 U.S. at 424-25. This circuit, citing Ford, has acknowledged that the applicable procedural bar to consider is the one in effect "at the time of the petitioner's purported default." Wells v. Maass, 28 F.3d 1005, 1010 (9th Cir. 1994).

Respondent can legitimately argue that the above cited law permits petitioner to claim that prior to Clark, he had a "right" to file a belated state habeas petition, and that California law certainly has

never stood for that proposition. While respondent may be correct in this assertion, the issue here is whether California law was sufficiently, consistently applied in the past (pre-Clark) with respect to untimely petitions, and this court is bound by the Ninth Circuit holding that it was not. This court is further bound by the Supreme Court and Ninth Circuit holding that any procedural default must be judged at the time the alleged default was incurred. Because any potential default herein was incurred during the pre-Clark period (see footnote 1, supra), no procedural default (bar) may be entered on account of an "untimely" petition.[3/]

B. Failure To Raise Claim On Direct Appeal Or At Trial

3/ Petitioner argues in opposition to the motion to dismiss that California's procedural rules remain as unclear after Clark as before. For purposes of this motion, this court need not decide that issue.

Citing In re Harris, 5 Cal.4th 813, 826 (21 Cal.Rptr.2d 373) (1993), Clark and In re Waltreus, 62 Cal.2d, 218, 225 (42 Cal.Rptr. 9) (1965), the California Supreme Court rejected 39 claims as "also procedurally barred in that they were or could have been, but were not, raised on appeal or were waived by failure to preserve them at trial." This ambiguous portion of the opinion does not indicate which of the cases cited as presenting procedural bars applies to which claim, or which claims are barred by the appeal or trial defaults.

In re Waltreus does not present a procedural bar to consideration of a claim by a federal court. Waltreus stands for the California rule that issues resolved on appeal will not be reconsidered in a petition for habeas corpus. The California Supreme Court cites to Waltreus when a state petitioner has attempted to raise issues in state habeas corpus

proceedings that he already raised on direct appeal. Waltreus holds that "habeas corpus ordinarily cannot serve as a second appeal." Id. As the Supreme Court clearly stated in Ylst v. Nunnemaker, 501 U.S.797, 806, 111 S.Ct. 2590, 2596 (1991), all Waltreus stands for is the "ordinary state rule barring relitigation of claims raised on direct appeal"; it is uninformative of the issue of procedural bar. Id. Therefore, a citation to Waltreus does not mean that this claim is procedurally barred.

The California Supreme Court's rule precluding consideration in a petition for habeas corpus of a claim which could have been, but was not raised on appeal, has been known as the Dixon rule. See In re Dixon, 41 Cal.2d 756, 759 (1953). In re Harris, cited by the California Supreme Court in denying petitioner's state habeas petition announced the court's intention to apply the Dixon rule more

consistently in the future. However, as previously discussed, the procedural practice applicable to petitioner in this instance would be the one in existence at the time of his direct appeal. At the time of Bean's direct appeal, the Dixon rule was not adequate to preclude federal court consideration of a claim because it was not consistently applied by the California Supreme Court. Odle v. Calderon, 884 F.Supp. 1404, 1413 (N.D. Cal. 1995); Karis, 828 F.Supp. at 1467.

Finally, although there are several trial level procedural defaults that most probably have been consistently followed in the past, e.g., failure to object to prosecutorial misconduct, the California Supreme Court did not identify which claims were subject to what default, or what the specific default problem was with a particular claim. This court is not in the

position to speculate on behalf of the California Supreme Court.

PRIMA FACIE CASE

In denying petitioner's state habeas petition, the California Supreme Court, again citing Clark at (797-798) rejected ten claims as having been considered on the merits, and that the claims failed to state a prima facie case for relief. As to these claims, respondent, citing Jackson v. Cupp, 693 F.2d 867, 869 (9th Cir. 1982) argues unpersuasively that they are unexhausted. Respondent asserts that because the state court found that petitioner failed to state a prima facie case with respect to these ten claims, petitioner has not exhausted those claims. Respondent does not specify whether he contends petitioner has legally or factually failed to exhaust the claims which the California Supreme Court has found not to state a prima facie case. The statement of the California

Supreme Court that petitioner has not stated a prima facie case (a matter not considered at all by Jackson v. Cupp), means exactly what it says, , the court has considered the matters on the merits and has found them wanting. The denying of a claim on the merits has nothing to do with exhaustion except to indicate that exhaustion has occurred.4/ The state court was

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4/ Perhaps respondent was confusing the situation here with the Jackson v. Cupp statement that where state remedies remain available, exhaustion has not been satisfied. However, this is not the case here. The ten claims were considered on the merits and were denied. There are no available state remedies remaining for these claims. It is also possible that respondent is confusing the In re Swain, 31 Cal.2d 300, 209 P.2d 793 (1934), doctrine with the situation here. Swain stands for the proposition that the petitioner has failed to state the facts clearly enough for the state supreme court to rule on the merits, and by definition, the court has therefore not ruled on the merits. See, Kim v. Villalobos, 799 F.2d 1317, 1319 (9th Cir. 1986). Such unclear claims are not exhausted. However, again, the state supreme court did reach the claims on the merits.

In the case at bar, respondent would have this court send the ten "unexhausted" claims back to state court for further determination on the merits which inevitably would result in another ruling that the claims fail to state a prima facie claim, which would then

presented with the "opportunity" to rule on the merits of the claims, Jackson v. Cupp, 693 F.2d at 869, and it did so; such claims are exhausted. Id. Moreover, such a holding as was made by the state supreme court in this case (denial on the merits for failure to state a prima facie case) is inconsequential to the federal courts for two reasons: (1) the state supreme court did not specify whether it denied the claims based on state or federal law; (2) if based on federal law, the federal court is not bound by such a general statement in any event (Jackson v. Cupp, 693 F.2d at 869).

Therefore, the state supreme court denial of certain claims on the merits does not implicate failure to exhaust or procedural default.

FAILURE TO PRESENT A FEDERAL CLAIM

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require another remand for exhaustion, which would be followed by yet another ruling. . . .Nothing in habeas corpus law requires such a volley.

Respondent's argument that certain claims do not present a federal claim is premature. The court will not make this determination at the present time.

Accordingly, IT IS HEREBY RECOMMENDED that respondent's motion to dismiss be denied in its entirety.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within **twenty (20)** days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure

to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: November 13, 1995.

UNITED STATES MAGISTRATE JUDGE

APPENDIX D

FILED
March 29, 1995
Clerk, U.S. District Court
Eastern District of California
/s/ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTHONY CORNELL BEAN, Petitioner, v. ARTHUR CALDERON, et al., Respondents.	Civ. S-90-0648 WBS GGH ORDER DEATH PENALTY CASE

Respondents seek dismissal of petitioner's habeas corpus action. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 302(c)(17).

On November 17, 1996, the magistrate judge filed findings and a recommendation to deny respondent's motion to dismiss in its entirety. On December 12, 1995, respondents filed objections to the

findings and recommendation. On December 21, 1995, petitioner filed a reply.

Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 304, this court reviews the magistrate judge's findings and recommendation de novo. The court finds the findings and recommendation are supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The Findings and Recommendation filed November 17, 1995, are adopted; and

2. Respondents' motion to dismiss is denied.

DATED: March 28, 1996

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE